Nos. 90-954; 90-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER
Robert C. Rufo

CHESTER A. JANIAK
Counsel of Record
THOMAS D. BURNS
PETER J. SCHNEIDER
ANN E. MERRYFIELD
WALTER M. FOSTER
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

ROBERT C. RUFO
200 Nashua Street
Boston, Massachusetts 02114
(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Should requests to modify consent decrees which govern the administration of important public institutions such as jails or prisons be subject to: (a) the "grievous wrong" standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), (b) a "flexible standard" adopted by the majority of the Circuit Courts of Appeals that considers both the unique features of public institutions and important principles of federalism, or (c) a new standard adopted by the First Circuit in this case that is even more stringent than the "grievous wrong" standard?

PARTIES TO THE PROCEEDING:

The petitioners are Robert C. Rufo, Sheriff of Suffolk County, Massachusetts and the Mayor of Boston, Massachusetts (No. 90-954); and Thomas C. Rapone, Commissioner of Correction of Massachusetts (No. 90-1004).

The respondents are the inmates of the Suffolk County Jail, a class of persons.

In addition, the following parties are inactive: City Council of the City of Boston; Deputy Commissioner of Capital Planning and Operations of Massachusetts; and Secretary of Administration and Finance of Massachusetts.

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The opinion of the Court of Appeals (Sheriff's Petition for Writ of Certiorari, hereinafter "Sheriff's Cert. Pet.," 1a) is unreported. The opinion of the District Court (Sheriff's Cert. Pet. 5a) is reported at 734 F.Supp. 561 (D. Mass. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1990. (Sheriff's Cert. Pet. 3a.) The Court of Appeals affirmed the District Court's denial of the petitioner's request to modify a consent decree. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Sections 1 and 5 to the Constitution of the United States provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The Original June 1973 Order

This action was initiated in the United States District Court for the District of Massachusetts in 1971, on behalf of the inmates of the Suffolk County Jail.[1] (First Circuit Record Appendix, hereinafter "F.C.R.A.," 6.) At that time, the Suffolk County Jail was located on Charles Street in the City of Boston and was known as the "Charles Street Jail." The inmates alleged that the conditions of their confinement violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Due Process clause of the Fourteenth Amendment. (Sheriff's Cert. Pet. 24a.)

On June 20, 1973, the District Court issued an opinion and final judgment that the then existing conditions at the Charles Street Jail were unconstitutional and permanently enjoined the Sheriff of Suffolk County (hereinafter "Sheriff"), petitioner here, *inter alia*, "from housing at the Charles Street Jail after November 30, 1973, in a cell with another inmate, any inmate who is awaiting trial." (Sheriff's Cert. Pet. 48a.) In support of the injunction, the District Court made several findings regarding the conditions of confinement of pretrial detainees then existing at the Charles Street Jail, including the existence of antiquated cells with inadequate heat or air circulation; inadequate plumbing; nonfunctional toilets, sinks and showers; an infestation of rats, mosquitoes and other rodents and insects; unduly high noise levels throughout the jail; serious fire hazards due to a lack of exit pathways and no emergency backup electrical system; inadequate food supplies and clothing; and an over-crowded situation which taxed these meager services beyond their capabilities. (Sheriff's Cert. Pet. 25a-35a.) In light of these findings of fact, the District Court ordered that no pretrial detainees be held at the Charles Street Jail after June 30, 1976. (Sheriff's Cert. Pet. 48a.)

[1] Suffolk County consists of the cities of Boston, Chelsea and Revere and the town of Winthrop.

The Consent Decree

In 1979, in order to comply with the court's June, 1973 Order, the parties entered into a Consent Decree to build a new high-rise Suffolk County Jail adjacent to the Charles Street Jail. (Sheriff's Cert. Pet. 15a.) The seven-page Consent Decree incorporates the "Suffolk County Detention Center, Charles Street Facility, Architectural Program" (the "Architectural Program"). (Sheriff's Cert. Pet. 16a.) The Architectural Program, a 110-page document, describes the functional spaces to be included in a new Suffolk County Jail for, *inter alia*, medical services, education, indoor and outdoor exercise, visitation, laundry and male and female housing. (F.C.R.A. 181-290.) The sections describing male and female housing units include provisions for showers, a dining area, telephone access, temperature, lighting and acoustical specifications and "single occupancy rooms." (Joint Appendix, hereinafter "J.A.," 72-87.)

The Consent Decree states, as the plaintiffs' "desire," that "as soon as possible, all present and future members of the class, including persons who will later become inmates of the Suffolk County Jail, will not be exposed to unconstitutional conditions of pretrial confinement." (Sheriff's Cert. Pet. 15a.) Defendants' stated their "desire" to "fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees," and "to house pretrial detainees at the existing 'Charles Street Jail' until a constitutional replacement can be provided." (Sheriff's Cert. Pet. 15a.) In the Consent Decree, the defendants agreed to "construct, maintain and operate, as applicable, a new facility for the detention of both males and females who are committed to the custody of the defendant Sheriff prior to, and pending their trials and de novo appeals." (Sheriff's Cert. Pet. 16a.) Single-celling is never mentioned in these statements of purpose or elsewhere in the Consent Decree itself, but only in the incorporated Architectural Program. (J.A. 73.) The parties to the Consent Decree explicitly

recognized the possibility of changing conditions and the continuing need to adapt the Architectural Program to the existing circumstances in paragraph five of the Decree, which states that the Architectural Program may be modified either by assent of both parties or by the Court. (Sheriff's Cert. Pet. 21a.)

The only factual assumption stated anywhere in the Consent Decree or Architectural Program is that the pretrial detainee population would decline throughout the 1980's and 1990's, and would be less than 230 by 1990. (J.A. 69.) This assumption was based on a population projection prepared at the direction of the City of Boston by an independent consulting firm. (J.A. 131.)

The 1984 State Litigation

By 1984, because of the inaction of the Mayor and City Council of the City of Boston, who collectively are the Suffolk County Commissioners, a new jail had still not been built, even though the contract bids were to have been awarded by January, 1981. (Sheriff's Cert. Pet. 21a.) In October, 1984, the Sheriff refused to accept into his custody persons for whom bail had been set in the district courts and Superior Court of Suffolk County, because he could not hold them in the Suffolk County Jail without double-bunking them. The Sheriff left these persons in the state courthouse lockups, thus precipitating a suit by the Attorney General against the Sheriff in the Massachusetts Supreme Judicial Court. (F.C.R.A. 302-08.) The Sheriff then filed suit in the Supreme Judicial Court (the "State Litigation") against the Mayor and the City Council to compel the construction of a new Suffolk County Jail.[2] (F.C.R.A. 309-16.) The Sheriff brought suit exclusively under state law to solve the dilemma created by his inability both to take pretrial detainees into his custody and, at the same time, to comply

[1] The Sheriff has no power, under state law, to appropriate capital or operating funds and is dependent upon funds provided him by the Suffolk County Commissioners, who at that time alone had appropriation power pursuant to Mass. Gen. L. Ann. ch. 34, §§ 3, 14 (West 1985).

with the District Court's June, 1973 Order prohibiting double-bunking at the Charles Street Jail.

Orders entered in the State Litigation compelled the Mayor and the City Council to construct a new Suffolk County Jail. *Attorney General* v. *Sheriff of Suffolk County*, 394 Mass. 624, 477 N.E.2d 361 (1985). In response to these orders, the state legislature provided funding for the new jail by enacting 1985 Mass. Acts. ch. 799. (F.C.R.A. 335-48.)

The Scheme Established For Coping With Inmate Commitments In Excess Of The Number Of Cells At The Charles Street Jail

The District Court, in addition to prohibiting double-bunking at the Charles Street Jail, also established certain mechanisms to accommodate the excess demand for jail space while a new jail was built. In the State Litigation, the Supreme Judicial Court added an additional mechanism to be used when the number of inmates exceeded the number of cells at the Charles Street Jail.[3] (F.C.R.A. 389-406.) Consequently, pending completion of the new jail, the Sheriff employed five mechanisms to maintain single-celling.

First, the District Court, in an order entered in November, 1973, permitted the Sheriff to transfer any pretrial detainee who had previously served a sentence in a correctional facility of the Commonwealth to a state correctional institution pursuant to Mass. Gen. L. Ann. ch. 276, § 52A (West 1972 & Supp. 1991). (J.A. 20.) When entering its November, 1973 Order, the District Court expressly noted that the state correctional system had extra cell space, that it could accommodate the inmates transferred, and that only the Commissioner of Correction had the resources (at that time) to provide accommodation for Suffolk County pretrial detainees, so that the Sheriff could comply with the single-celling requirement at the Charles Street Jail. (J.A. 13-17.)

[3] Orders of the Supreme Judicial Court of Massachusetts in the State Litigation are adopted as orders of the Federal District Court in this litigation, unless a party objects within thirty days. (J.A. 112.)

Second, the District Court's June, 1973 Order continued the "Bail Appeal Project" under which the Sheriff's legal staff expedites bail appeals on behalf of detainees held in the Sheriff's custody. (Sheriff's Cert. Pet. 54a.) Under the Bail Appeal Project, funded by Suffolk County, the Sheriff's legal staff performs all the preparatory work and provides counsel for hearings reviewing bails set at the time of arraignment in the district courts. These hearings must be held at the next regular sitting of the Superior Court of Suffolk County. (J.A. 212.) Upon motion of the Sheriff, the funding and staff of the Bail Appeal Project were substantially increased by an order entered in the State Litigation on January 9, 1985. (J.A. 140, 144.)

Third, the sheriffs of other Massachusetts counties have held Suffolk County pretrial detainees on a voluntary and space-available basis. (J.A. 138-40.) Most often, transferred inmates are double- or triple-bunked at these other county jails. *See* Brief of Amici Curiae filed on behalf of the individual Sheriffs of the other counties of Massachusetts at 2.

Fourth, if after exhausting the above three mechanisms, the inmate population still exceeds the number of available cells, the Sheriff must, pursuant to a procedure established in the State Litigation, transfer detainees to "halfway houses." (F.C.R.A. 389-406.) Under this procedure, the Sheriff must submit to a judge of the Superior Court sitting in Suffolk County a list of the names of inmates who are being held on bail. The judge must then reduce the bail of a sufficient number of inmates to release on personal recognizance so that the number of inmates no longer exceeds the number of cells. These inmates are then transferred from the maximum security jail to insecure halfway houses operated by private contractors. (J.A. 140-41, F.C.R.A. 391.)

Finally, if the inmates committed to the Sheriff's custody cannot be accommodated as set forth above, the judge is required to release inmates directly to the street.

The New State-Of-The-Art Nashua Street Jail

The new jail, ultimately constructed on Nashua Street in Boston (the "Nashua Street Jail"), was completed in May, 1990, at a cost of 54 million dollars. It is one of the most modern facilities of its kind in the country. (J.A. 209, F.C.R.A. 998-99.) The new Suffolk County Jail at Nashua Street includes a variety of functionally distinct spaces to meet the special needs of inmates and operate a correctionally sound pretrial detention facility. There are 282 cells divided into eight self-contained housing units for male inmates. Each housing unit contains two tiers of sixteen to nineteen cells, a "day room" where meals are served and detainees may spend their out-of-cell time, a separate "quiet" or "multi-purpose" room, counselling, noncontact visiting and attorney-client rooms, a washer and dryer for personal laundry, a kitchenette for serving meals prepared in the central kitchen, two televisions, weight-lifting equipment, telephones for use by detainees and access to an outdoor recreation deck shared with the adjoining housing unit. (J.A. 136-37.)

In addition, there are units for housing female detainees, intake and classification of male inmates before assignment to a housing unit (thirty-five cells), administrative and disciplinary segregation (sixty-six cells) to hold male inmates who pose a threat to jail officers or other inmates, protective custody (eight cells) to hold male inmates who are in need of additional protection from fellow inmates, and infirmary, psychiatric observation and suicide prevention (twenty-two cells). (J.A. 134.)

The jail also contains a contact visiting area, chapel, general library, classroom space for use by inmates, access to legal materials and a large central gymnasium complete with weight lifting and exercise equipment. Because of the modern, expanded facilities at the new Nashua Street Jail, there are extended visiting hours seven days a week, including holidays. Also, all areas of the jail are climate-controlled. (J.A. 133-37.)

In contrast, the old Suffolk County Jail at Charles Street, aside from five infirmary cells, contained none of these functionally distinct spaces. None of the conditions the District Court found to exist at the Charles Street Jail which served as the predicate for the inmates' lawsuit are present at the Nashua Street Jail. (F.C.R.A. 687-92.)

The Sheriff's Modification Request And The Decision Below

As constructed, the Nashua Street Jail has a total of 453 cells. Although the Consent Decree originally provided for only 309 cells, the Decree was modified in 1985 to increase the number of cells to accommodate what appeared to be a moderate increase in jail population.[4] By the time construction began on the new Nashua Street Jail in September, 1987, it appeared that the 453 cells then planned were more than adequate to accommodate further increases in population.[5]

Unfortunately, the Consent Decree's factual assumption of a declining inmate population and the assumption made when the number of cells was increased were inaccurate, and the number of cells in the new Nashua Street Jail is now insufficient to house what became an explosion in the jail population. That explosion, however, was not evident until well after the con-

[4] In 1985, the Decree was modified to increase the number of cells from 309 to 435 (405 male, 30 female cells). (J.A. 110.) When the site for the jail was moved from Charles Street to Nashua Street and changed from a high-rise to a seven-story structure, the new site allowed construction of 453 cells (413 male, 40 female cells). At that time, a number of additional amenities not required by the Architectural Program were added, including construction of six recreation decks rather than one rooftop recreation deck as originally planned.

[5] During 1985, the daily average number of male detainees committed to the Sheriff's custody ranged from 284 to 352, averaging 326 for the year, substantially less than the increased number of cells planned for the new jail. The daily average number of male detainees in 1986, 321, was lower than the 1985 average. In addition, the daily averages at the end of 1986 had declined or remained constant compared to the beginning of the year. Although the daily average increased somewhat in 1987 to 370, the numbers continued to be substantially less than the then-planned 405 cells for the male inmates at the new jail. (J.A. 243.)

struction on the new jail was underway. Only in July, 1988, ten months after construction began, did the number of pretrial detainees exceed 400 and begin to approach the number of cells in the new jail. (J.A. 243.)

Moreover, as the inmate population expanded in Suffolk County, it also expanded in other counties and in the state prison system, undermining the scheme established for accommodating inmates committed to the Sheriff's custody in excess of the number of cells. Inmates transferred under Mass. Gen. L. Ann. ch. 276, § 52A to state correctional facilities were being held in prisons that were operating at well in excess of their planned capacity. Indeed, by May, 1989, these facilities were at 185% of capacity. (J.A. 259.) Also, other county facilities, to which the inmates were transferred, including those counties geographically adjacent to or near Suffolk County, were subject to caps imposed by federal or state court orders. (F.C.R.A. 427-70.) Consequently, to comply with the Consent Decree's double-bunking prohibition the Sheriff has to transfer pretrial detainees to distant counties at a cost of close to one million dollars per year in transportation costs alone. (J.A. 214.)

Release to halfway houses had also become an inappropriate alternative to holding detainees in the county jail because at least 10% of the detainees walk away from these insecure facilities. (J.A. 140-41.) The marked increase in the pretrial detainee population had created a conflict between the Sheriff's obligation to hold all the inmates committed to his custody as imposed by orders of the court (mittimuses) and by statute, Mass. Gen. L. Ann. ch. 268, § 20 (West 1990), and the Architectural Program's single-celling requirement. The Sheriff continues to be faced with these conditions and conflicting obligations.

In July, 1989, faced with increases in the pretrial detainee population and his inability to rely on the previously-established scheme, the Sheriff requested a modification of the Consent Decree to permit double-bunking 197[6] of the 453 cells

[6] In the Sheriff's original motion to modify, he requested to double-bunk 200 cells. This number was later decreased to 197. (J.A. 192-93.)

at the new Nashua Street Jail. This number was not chosen arbitrarily, but was chosen to provide at least thirty-five square feet of common, out-of-cell area per detainee in each of the regular housing units for male inmates, as recommended by standards promulgated by the American Correctional Association, and to maintain single-cell occupancy in those specialized units — intake and classification, administrative and disciplinary segregation, and infirmary and psychiatric care cells — where it is correctionally appropriate to single-cell. (J.A. 141-44, F.C.R.A. 96-97, 373-74.)

Under the Sheriff's double-bunking proposal, detainees would be out of their cells at least twelve hours per day[7] and would not be assigned to be double-bunked until they had been classified as suitable for double-bunking based upon a comprehensive classification plan. This plan would classify an inmate for double-bunking after a caseworker interview, a medical examination and a review of the inmate's medical, probation and jail records and his behavior while in custody. (J.A. 143, 203-04, F.C.R.A. 762-69.)

Under the proposed modification, the Bail Appeal Project would continue, but the Sheriff would no longer be compelled to transfer detainees to state and county facilities where the inmates transferred would, ironically, be double- and triple-bunked. (F.C.R.A. 799-819.) Moreover, the Sheriff would not have to rely on the designated Superior Court judge to determine who, amongst all of the inmates whose bail has already been reviewed twice, may be released to halfway houses or to the street.[8] The requested modification would ensure that the Sheriff has the ability to hold all the detainees committed to his custody, without releasing those inappropriate for release, while fully complying with all constitutional requirements.

[7] In fact, the inmates are typically out of their cells over twelve hours per day if they have court appearances, attorney conferences, social worker interviews, etc.

[8] Indeed, on four occasions, the Superior Court judge has refused, when presented with the list of detainees, to release any of the inmates, rendering the Sheriff unable to comply with the Consent Decree with no lawful alternative under state law.

In his request for modification, the Sheriff argued, *inter alia*, that:

(1) an increase in the number of detainees requires the Sheriff to double-bunk in order to administer his duties under the law;

(2) double-bunking only 197 out of the 453 cells would meet constitutional requirements;

(3) even with double-bunking, the purpose of the Consent Decree — to provide a constitutional jail for Suffolk County pretrial detainees — would be achieved; and

(4) this Court in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), has held that the Constitution does not prohibit double-bunking pretrial detainees.

The District Court, in a Memorandum and Order issued on April 9, 1990, (Sheriff's Cert. Pet. 5a-13a), denied the Sheriff's Motion to Modify the Consent Decree, rejecting the Sheriff's argument that the Court's decision in *Bell* v. *Wolfish* changed the constitutional standards governing the conditions of confinement of pretrial detainees, and holding that *Bell* did not directly overrule any legal interpretation on which the 1979 Consent Decree was based. (Sheriff's Cert. Pet. 10a.)

The District Court held that the Sheriff did not meet the strict standard for modification of consent decrees set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), rejecting the Sheriff's argument that increases in pretrial detainee population committed to his custody justified the proposed modification. (Sheriff's Cert. Pet. 11a.)

The Sheriff urged the court to adopt and apply a "flexible standard" for modification of consent decrees as developed in other circuits. In response, the District Court noted that, although the other circuits had adopted a "more flexible standard," the First Circuit had not. (Sheriff's Cert. Pet. 11a.) The District Court then purported to apply a "flexible standard," but in reality established an even more stringent standard than the *Swift* standard. The court reasoned that modification here would not be appropriate under the "flexible" standard that it defined, because it would violate one of the primary purposes

of the Consent Decree. (Sheriff's Cert. Pet. 12a.) Although the Consent Decree stated only that the parties "desired" a jail that met constitutional standards, the District Court found that the purpose of the Consent Decree was to provide conditions that "meet agreed upon standards," one of which was to hold only one inmate per cell. (Sheriff's Cert. Pet. 12a.) The District Court also reasoned that to permit such modifications would undermine and discourage settlements by consent decrees. (Sheriff's Cert. Pet. 12a.) Finally, the court explicitly rejected any consideration of public safety and fiscal restraints in making its determination. (Sheriff's Cert. Pet. 13a.)

The Sheriff then appealed the District Court's decision to the First Circuit, which affirmed the decision by an order and judgment entered on September 20, 1990. (Sheriff's Cert. Pet. 1a-4a.) The Sheriff's Petition for Certiorari was granted by this Court on February 19, 1991.

SUMMARY OF LEGAL ARGUMENT

This Court should adopt a flexible standard for consideration of motions to modify consent decrees in institutional reform litigation which would allow a modification if:

(1) the consent decree has had a significant adverse effect on the public defendant or on a particular public interest which effect appears during the administration of the decree or arises from a change in circumstance; and

(2) allowance of the requested modification would avoid the adverse effect without derogating from the purpose of the consent decree, as defined by the constitutional, statutory or regulatory provision that occasioned the court's original intervention and as that provision may have been further defined or clarified by subsequent judicial decisions or legislative action.

Unlike the stringent standard articulated by the Court in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), this flexible

standard is appropriate because it (1) accommodates the unique features of public institutions, (2) is consistent with fundamental principles of federalism which require courts to tailor remedies to the underlying federal law and to give deference to the autonomous functioning of state and local governments, and (3) is consistent with the decisions of the majority of the circuit courts that have considered the issue of the standard to apply to such modification requests.

Under this flexible standard, the modification the Sheriff requested should have been granted.

LEGAL ARGUMENT

I. THE STRINGENT *SWIFT* STANDARD SHOULD NOT BE APPLIED TO REQUESTS TO MODIFY CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION.

A. The *Swift* Standard Applied By The Courts Below Does Not Foreclose A More Flexible Standard.

In *United States* v. *Swift*, 286 U.S. 106 (1932), the Supreme Court considered the standard for the modification of consent decrees. In that antitrust case, the defendant meatpackers had entered into a consent decree prohibiting their involvement in several lines of business. In addressing the defendants' request for modification, the Court first noted that all consent decrees are subject to modification:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . If the [power to modify] had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. *A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.*

Swift, 286 U.S. at 114 (emphasis added).

The Court then distinguished between decrees "that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change" and those "that involve the supervision of changing conduct or conditions and are thus provisional and tentative." *Swift*, 286 U.S. at 114. Without stating the standard to be applied to a "provisional and tentative" decree, the Court applied a strict standard to the decree before it:

> The inquiry for us is whether the changes are so important that the dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Swift, 286 U.S. at 119.

The Court in *Swift* distinguished between two types of decrees, but stated a modification standard to be applied only to one — a standard for modification requests brought by private parties with a propensity toward behavior that harmed the public interest. Because the facts were "substantially impervious to change," the consent decree was necessary to protect the public from anti-competitive behavior well into the future. The interests of the public, therefore, would not be adversely affected by continuation of the decree as originally entered. Rather than mandating a stringent standard for reviewing modification requests in all cases, the Court recognized that certain types of decrees, unlike the one before it, would require flexibility to accomplish their purpose. *Swift*, 286 U.S. at 114.

Swift was decided in 1932, long before the Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the first of what has since been termed "structural/institutional reform litigation." *See* Fiss, *The Supreme Court 1978 Term, Foreword*: *The Forms of Justice*, 93 Harv. L. Rev. 1, 2 (1979) [hereinafter *The Forms of Justice*]. Since that historic decision, courts have been faced with the challenge of fashioning remedies to redress constitutional or statutory violations by public institutions, while still accommodating the inherent differences between these public institutions and private party litigants. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977) [hereinafter *Implementation Problems*].

The District Court and First Circuit below, however, failed to recognize the distinctions made in *Swift*. Instead, the District Court opinion, affirmed by the First Circuit, first applied the stringent *Swift* standard, and then, purporting to apply a "flexible" standard, in reality articulated a standard even more stringent than the *Swift* standard, because application of that standard would prohibit a needed change of any provision that was "agreed upon." (Sheriff's Cert. Pet 12a.) This standard would rob a court of its equitable power to make any necessary, substantive modifications.

B. The Particular Features Of Institutional Reform Litigation Require That A Flexible Standard Be Applied To Modification Requests.

Courts have recognized that when administering consent decrees that govern jails, prisons, mental hospitals, state and local health and welfare agencies, school systems and other public institutions, factors unique to these institutions, but not present in litigation involving private defendants like those in *Swift*, must be taken into consideration. Litigation involving public institutions, unlike litigation involving private parties, typically seeks to effectuate the long-term reform of public institutions to vindicate rights secured by federal law through the use of complex decrees that require ongoing judicial supervision. Note, *Implementation Problems*, 91 Harv. L. Rev. at

428; *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1120 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

The federal rights that institutional reform litigation typically attempts to redress — *e.g.*, the Eighth or Fourteenth Amendments — are not specific as to remedy. The right requires some minimal constitutional threshold for compliance, but a wide range of remedies would adequately vindicate that right, and the Constitution does not compel any particular remedy. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. at 49; Note, *Implementation Problems*, 91 Harv. L. Rev. at 438. The selection of a remedy, from the wide range of available remedies, and other considerations require that courts give deference to state or local officials when deciding upon a means for compliance. *Rhodes* v. *Chapman*, 452 U.S. 337, 349 (1981) (practical considerations favoring single over double-bunking in state prison are properly for the legislature and prison administration, not a court, to decide); *Bell* v. *Wolfish*, 441 U.S. at 547, 562 (1979) (prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices, and in determining which among a wide range of possible remedies to use to meet constitutional standards).

Over time, public officials gain knowledge and experience in the operation of their institutions when under a consent decree and need to "fine-tune" the decree in accordance with that newly-gained knowledge and experience. Moreover, public officials are often faced with a multitude of competing obligations and changes in circumstances over which they have no control but which affect their institutions. Nevertheless, officials must be able to change their policies to comport with any changes and competing obligations. *Heath* v. *DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989) (broad judicial deference is required in supervising consent decree involving a public institution to allow fine-tuning of goals with the benefit of time and experience, and to allow for more effective utilization of

government resources); *Nelson* v. *Collins*, 659 F.2d 420, 427 (4th Cir. 1981) (en banc) (state prison faced with changes in circumstances over which it had no control).

A further distinction between injunctive decrees involving public institutions and those involving private defendants is that public interests, in addition to the enforcement of rights under federal law, are implicated. *Duran* v. *Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Plyler* v. *Evatt*, 846 F.2d 208, 211 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988). Although a remedy in institutional reform litigation may protect one public interest, *e.g.*, the vindication of a federally-secured right, it may also adversely affect other public interests. This adverse effect may first become apparent during the administration of the decree, *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1117-18, or may arise from a changed circumstance since the decree was entered. *Nelson* v. *Collins*, 659 F.2d at 424. There may then be continuing harm to the public interest, if a change is not made in the consent decree under which the institution operates. Thus, consent decrees should be modified if they cause injurious effects to the public interest. Jost, *From Swift to Stotts and Beyond: Modifications of Injunctions In The Federal Courts*, 64 Tex. L. Rev. 1101, 1149 (1986). Similarly, other public institutions may be affected by a consent decree, even though they are not parties to the decree and offered no "consent" or input into the decree.

This case presents an archetypal example of a consent decree intended to effect institutional reform, and the corresponding problems in administering the decree over time, in light of changing circumstances and competing obligations. The Sheriff is obligated by statute, Mass. Gen. L. Ann. ch. 268, § 20, to hold pretrial detainees and to produce them in court. The purpose for holding pretrial detainees is two-fold: first, to insure that those accused appear for trial, and second, to assure the safety of "any person or the community." Mass. Gen. L. Ann. ch. 276, § 58 (West 1972 & Supp. 1991). Both purposes benefit the public's interest in the efficient adminis-

tration of the criminal justice system and in being safe in their homes and on the street.

The Sheriff's ability to meet his obligations is affected by a number of factors, including the state's scheme, as set forth in the bail statute, Mass. Gen. L. Ann. ch. 276, § 58, for setting and reviewing bail; the nature of the crimes charged; the number of crimes and arrests within Suffolk County; the resources the state and City of Boston commit to constructing new jail facilities; the availability of space in jails in other counties, or in state correctional facilities, to which the Sheriff can transfer detainees; and the funds available to effect these transfers. The Sheriff has no control over these factors, but must operate within their confines, as well as within the confines of the Consent Decree.

At present, if the Sheriff cannot meet all of these obligations, a judge must release detainees on personal recognizance to halfway houses or to the street, undermining the crucial two-fold public interests at stake. (J.A. 211, F.C.R.A. 397-99.) The Sheriff, thus, is faced with the prospect of either being in contempt of the Consent Decree or being in violation of his duties imposed by state statute, the orders (mittimusses) of the Suffolk County courts and his oath of office to serve and protect the citizens of Suffolk County.

Because of the nature of institutional reform litigation, consent decrees should be supervised flexibly, both to achieve the broad federally-mandated rights the decree was intended to effect and to protect public officials, institutions and interests from the adverse effects of the decree. The courts below in the present case did not consider these distinguishing features or recognize the need for flexibility. Instead they applied the inappropriate *Swift* standard and a "flexible standard" that does not accommodate these distinguishing features, but forecloses the practical possibility of substantive change.

C. The Circuit Courts Have Rejected Or Distinguished *Swift* In Considering Modification Requests In Institutional Reform Litigation.

The circuit courts have either distinguished *Swift*, or completely rejected its stringent standard, in considering requests for modification of consent decrees in institutional reform litigation, because that stringent standard does not accommodate the unique features of the litigation. Instead, these courts have held that a more flexible standard is appropriate. The First Circuit, as noted in the District Court's opinion, has not adopted a flexible standard. (Sheriff's Cert. Pet. 11a.)

The consent decree in *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980), required the state of Pennsylvania to implement, pursuant to a timetable, a medical screening and outreach program. The state moved to modify the timetable. The Third Circuit distinguished *Swift* on two grounds. First, the proposed *Shapp* modification would keep in force most of the provisions of the decree and avoid the "evils" the decree was intended to eliminate. 602 F.2d at 1120. Second, the *Shapp* decree was an ongoing, complex decree that, despite good faith, could not be complied with due to circumstances beyond the defendants' control. 602 F.2d. at 1121. The court affirmed the grant of the requested modification.

The Second Circuit then followed with its decision in *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983). In *Carey*, the state defendants were ordered to relocate patients from a large and notorious mental institution to small residences with a maximum of fifteen beds. The state defendants moved to modify the decree to allow them to place certain patients in facilities with up to fifty beds. The court recognized that considerations unique to institutional reform litigation rendered the stringent *Swift* standard inapplicable. In particular, the court held that, in institutional reform litigation, judicially-

imposed remedies must be adaptable to improvement when a better understanding of the problem emerges and to accommodation of a wider constellation of interests than is represented in the courtroom. *Carey*, 706 F.2d at 969. In addition, the court held that in this type of litigation, the effect on those persons or interests not before the court should be considered. 706 F.2d at 969-70 (quoting Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976)).

At least six additional appellate courts have, following a flexible standard, considered the modification of consent decrees to allow double-bunking in jail or prison reform litigation, and have found the stringent *Swift* standard inapplicable.[9] These courts have held that a modification is justified if the current remedy is not working effectively or is burdensome, and that a flexible standard that considers the risks to public institutions and interests as well as impositions on the prisoners is appropriate. In both *Nelson* v. *Collins*, 659 F.2d at 424, and *Newman* v. *Graddick*, 740 F.2d 1513, 1520, (11th Cir. 1984), the courts found the decrees to be the "provisional and tentative" type contemplated in *Swift*. In *Plyler* v. *Evatt*, 846 F.2d 208, 211-12, (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), the court held that the *Swift* standard was inappropriate because it did not consider the unique demands of institutional reform litigation. In *Heath* v. *DeCourcy*, 888 F.2d at 1110, the court also considered a request for modification of a consent decree to double-bunk a greater number of inmates to accommodate a rising prison population. Again, the court held that, because the effect of consent decrees reaches beyond the parties directly

[9] The Seventh Circuit, in *Duran* v. *Elrod*, 760 F.2d 756, 758 (7th Cir. 1985), also considered a request to modify a consent decree so that the Cook County jail could be double-bunked for seven weeks until a new jail was opened. The court held that it need not consider whether a flexible standard should apply, because the defendants met even the stringent *Swift* standard. Citing federalism and the public interest as overriding concerns, the court found that new data on fugitives and recidivism constituted a new and unforeseen circumstance justifying double-bunking over early release. 760 F.2d at 762.

involved in the suit, a more flexible standard than the *Swift* standard, that balances private and public interests, should be applied.[10]

The courts below did not apply any formulation of the flexible standard discussed in the majority of the circuit courts, but instead formulated and adopted an unprecedented standard and incorrectly labelled it as "flexible." (Sheriff's Cert. Pet. 11a-12a.)

II. CONTRACT PRINCIPLES DO NOT APPLY TO CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE USED TO DEFEAT A NEEDED MODIFICATION.

The District Court below improperly applied contract principles to the Sheriff's request to modify the Consent Decree. Although the circuit courts, in considering requests to modify consent decrees in institutional reform litigation, have consistently found unhelpful *Swift's* stringent standard, they have, like *Swift*, also found arguments based on analogies to contract principles unhelpful. In *Swift*, the Court rejected the argument that:

> a decree entered upon consent is to be treated as a contract and not as a judicial act . . . . The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should be necessary in adaptation to events to be.

Swift, 286 U.S. at 115.

[10] Even when denying a request to double-bunk, the courts in *Ruiz* v. *Estelle*, 811 F.2d 856, 861 (5th Cir. 1987) and *Twelve John Does* v. *District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988), recognized the need for a flexible standard in prison reform cases when considering requests to modify consent decrees.

Similarly, in *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961), the Court, in considering a motion to modify a consent decree, held that a consent decree should not be treated as a contract, but rather as a judicial act. The Court held that authority to adopt and modify a decree comes only from the underlying law which the decree is intended to enforce, and not from the parties. *Id.*

Following *Swift* and *Wright*, the courts have consistently rejected the argument that obligations imposed under a consent decree may not be changed or lessened because the parties had consented to them. In *Duran* v. *Elrod*, 760 F.2d at 760, the court held that, in deciding whether to modify a consent decree governing the operation of jails, a court cannot merely rely on the "sanctity of contracts." Instead, a court must consider the concrete impact of the modification on the public interest as well as on the parties to the case. *Id.*

Similarly, in *Plyler* v. *Evatt*, 846 F.2d 208, 215 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), the court held that a consent decree in a prison reform case is not an ordinary contract, but a compromise to provide constitutionally adequate prison conditions. The court held that consent decrees require a flexible approach to modification which may alter the original compromise. 846 F.2d at 212; *accord, Newman* v. *Graddick*, 740 F.2d at 1520 (consent decrees in prison reform litigation are judicial acts, not *inter partes* contracts).

Hence, the Sheriff here is not foreclosed from seeking a modification of the single-celling provision contained in the Architectual Program solely because his predecessor consented to the Program. The District Court's reasoning below that the decree could not be modified because it was an agreement upon "standards" is directly contrary to the consistent holdings of this Court and the circuit courts that consent decrees are not to be treated as contracts.

III. PRINCIPLES OF FEDERALISM REQUIRE FLEXIBILITY IN THE SUPERVISION OF INSTITUTIONAL REFORM LITIGATION.

This Court has articulated important principles of federalism and equity that define and limit a court's authority when fashioning remedies to redress constitutional or statutory violations. A court should also apply these principles in deciding a disputed modification request in institutional reform litigation.

A. Remedies Must Be Narrowly Tailored To The Underlying Constitutional, Statutory Or Regulatory Provision That Occasioned The Original Intervention.

A remedy must be intended to eliminate a condition that violates the constitutional, statutory or regulatory provision that occasioned the intervention, or to eliminate a condition flowing from such violation. In *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977), the Court noted this "inherent limitation upon federal judicial authority" flowing from "equitable principles" in holding that court-imposed remedies "exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."

In *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. 630 (1991), this Court applied this principle to a request to dissolve an injunction entered in a school desegregation case. This Court held that dissolution would be appropriate based on a finding by the district court that the unlawful conduct of the public officials had come to an end and was unlikely to be resumed, and because any existing residential or school segregation was due to other factors. *Dowell*, ___ U.S. ___, 111 S.Ct. at 638. Thus, when the condition that had occasioned intervention had been eliminated, local government control could be restored. *Dowell*, ___ U.S. ___, 111 S.Ct. at 637.

The principle that remedies be narrowly tailored to the underlying law has also led courts to consider changes in the law

when deciding requests to modify consent decrees or injunctions. In *System Federation No. 91* v. *Wright*, 364 U.S. at 651, the Court allowed the modification of a consent decree when the underlying law which formed the basis for the decree, the Railway Labor Act, was amended, holding that a court must "be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." In so holding the Court noted, "[t]he parties cannot, by giving each other consideration, purchase from a court of equity continuing jurisdiction." 364 U.S. at 651. The Court continued that the only source of a court's authority to adopt a consent decree is the law the decree was intended to enforce. *Id.*

The Court's reasoning in *Wright* is equally applicable to decisions clarifying or further defining constitutional provisions that form the basis of consent decrees. Judge Friendly, in *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 971, applied the *Wright* analysis to the request for modification pending before the court to determine the effect of the ruling in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). The court held that the change of law set forth in *Youngberg* clarifying the deference to be given to the professional judgment of the administrators of public institutions must be considered by a court when determining whether to permit the change in remedy proposed. Judge Friendly stated, "[w]e can see no reason for a different view when the requirement is constitutional and a subsequent decision of the Court has made clear that the Court entering the decree interpreted the requirement too broadly." *Carey*, 706 F.2d at 971 (citing *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975)).

In *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 576 n.9, 579 (1984), the Court, in considering a motion to modify a consent decree, again recognized and applied the principle that the remedies available to a court are limited and must be tailored to the federal law to be enforced. In that case, a requested modification was denied on the grounds that the

underlying statute, Title VII, did not permit the modification. The Court noted that Title VII acted as a limit on the district court's authority to modify the decree, prohibiting any modification that was inconsistent with the statute. 467 U.S. at 576, n.9.[11]

In *Local Number 93* v. *City of Cleveland*, 478 U.S. 501 (1986), the Court held, in another Title VII case, that a consent decree containing a provision that a court could not have ordered after an adjudication on the merits, could be entered as an order and enforced by the court. The Court, however, specifically reserved the question of the limits of a federal court's authority to order more than what federal law requires when deciding a disputed request to modify a consent decree:

> Because 706(g) [of Title VII] is not concerned with voluntary agreements by employers or unions to provide race-conscious relief, there is no inconsistency between it and a consent decree providing such relief, although *the court might be barred from ordering the same relief after a trial or, as in Stotts, in disputed proceedings to modify a decree entered upon consent.*

478 U.S. at 528 (emphasis added).

In this case, the District Court refused to consider changes in the law after the Consent Decree was entered and whether the Consent Decree as modified would provide for a jail that meets constitutional standards. Instead, the court dismissed the argument stating, "[e]ven if this were true [that double-bunking complies with constitutional standards], which it is not necessary to decide, it does not provide a basis for relief from a consent decree." (Sheriff 's Cert. Pet. 12a.) The District Court's refusal to consider the Court's holding in *Bell* v. *Wol-*

[11] In his dissent in *Local Number 93* v. *City of Cleveland*, 478 U.S. 501, 539 (1986), Justice Rehnquist would have also applied this principle to the adoption and enforcement of consent decrees so that no consent decree could be adopted which contained provisions that go beyond the underlying federal law and could not be ordered by a court.

fish and whether if double-bunked the Nashua Street Jail would meet constitutional standards was clearly contrary to the Court's holdings in *Milliken* v. *Bradley, Board of Education of Oklahoma City* v. *Dowell, System Federation No. 91* v. *Wright and Firefighters Local Nunion No. 1784* v. *Stotts*.

B. Remedies Imposed By Federal Courts Should Preserve The Autonomy Of And Defer To The Judgment Of State And Local Governments.

Consistent with limitations on the scope of federal judicial power, principles of federalism also dictate that a remedy should preserve, to the extent possible, the autonomy of state and local governments and the exercise of independent professional judgment by state and local officials. In *Milliken* v. *Bradley*, 433 U.S. at 280-81, the Court held that in fashioning a remedy, a court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." In *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. at 637, this Court applied this principle to dissolve an injunction, thereby returning control of public schools to local officials.

Also, to the extent possible, in fashioning a remedy, a court should defer to and minimize interference with the exercise of independent professional judgment by state and local officials. This principle of judicial deference is derived from several interconnected concerns, including the separation of powers and practical concerns. The principle of separation of powers cautions against the assumption by the judiciary of functions properly charged to the legislative or executive branches. *Bell* v. *Wolfish*, 441 U.S. at 548 (citing *Procunier* v. *Martinez*, 416 U.S. 396, 404-05 (1974)). Such deference is particularly appropriate in administering jails and prisons, which are complex institutions whose effective administration depends upon the judgments of experienced professionals. *Rhodes* v. *Chapman*, 452 U.S. at 351; *Bell* v. *Wolfish*, 441 U.S. at 548 (quoting

Pell v. *Procunier*, 417 U.S. 817, 827 (1974)); *see also, Youngberg* v. *Romeo*, 457 U.S. at 322-23 (applying this principle to permit state officials to select remedies to protect state mental patient's Fourteenth Amendment liberty interests).

Without this judicial deference the court becomes a policy-maker and administrator, exercising political functions reserved to the executive and legislative branches of our federal, state and local governments. *See Duran* v. *Elrod*, 760 F.2d at 759 (federal judges know little about the management of prisons; such judgments generally are the province of other branches of government than the judicial); *see also, Plyler* v. *Evatt*, 846 F.2d at 212 (federal courts have traditionally adopted a policy of judicial restraint in the problematic area of prison administration).

The Sheriff here must operate the Suffolk County Jail, a complex facility, as a part of an overall county and state correctional system that encompasses the state criminal justice system and the state's bail scheme. The District Court's opinion, however, is completely devoid of any consideration of preserving the autonomous functioning of these state and county institutions or of deference to the professional judgment of the Sheriff and others who administer the state's criminal justice system.

IV. THE CIRCUIT COURTS HAVE CONSISTENTLY RELIED ON CERTAIN FACTORS IN DECIDING WHETHER TO MODIFY A CONSENT DECREE.

The circuit courts have consistently held that a standard other than the stringent *Swift* standard should be applied to requests for modification of consent decrees in institutional reform litigation. In allowing requests to modify consent decrees, these courts have emphasized certain factors as justifying modification.

First, the courts have recognized the propriety of modification when there has been some change in circumstance, requiring a corresponding change in the prospective application of the decree. *Plyler* v. *Evatt*, 846 F.2d at 212 (in decrees governing prison administration, revision is necessary if the remedy is not working effectively or is burdensome); *New York State Association for Retarded Children, inc.* v. *Carey*, 706 F.2d at 965-67 (circumstances changed, preventing state defendants from finding sufficient small facilities to house all state patients); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1118 (changed circumstances prevented state defendant from complying with timetable set in decree); *Nelson* v. *Collins*, 659 F.2d at 427 (increase in prison population required modification to allow double-bunking). A further justification for allowing modifications is the difficulty of predicting and planning the operation of public institutions, *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1120, and in particular, jail and prison capacity, *Nelson* v. *Collins*, 659 F.2d at 426.

Courts granting modifications because of changed circumstances also recognize that, when dealing with complex decrees and large public institutions, experience may present a better remedy.[12] *Heath* v. *DeCourcy*, 888 F.2d at 1108. In contrast to the *Swift* standard, the moving party under the flexible standard need not show that the changes justifying modification were "unforseeable." *Heath* v. *DeCourcy*, 888 F.2d at 1107 (defendant should have been aware at the time of agreement that jail population limits were not sufficient to hold population, but modification request granted).

[12] Indeed, some courts have adopted a "modern standard" that would allow modification of a consent decree solely because experience shows problems with its administration. *Keith* v. *Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (consent decree modified to allow for procedural change in staffing committee to oversee affirmative action compliance in public contracts); *Donovan* v. *Robbins*, 752 F.2d 1170, 1182 (7th Cir. 1985) (in approving a consent decree regarding administration of a union pension fund, court *in dicta* opined that decree can be modified if experience shows need).

Second, the courts have recognized that a change in the law relating to a consent decree favors modification. *Carey*, 706 F.2d at 971 (change in constitutional standard of amount of deference to allot to the judgment of professionals operating mental institutions); *Plyler* v. *Evatt*, 846 F.2d at 215, *Nelson* v. *Collins*, 659 F.2d at 424-25, *Newman* v. *Graddick*, 740 F.2d at 1521 (in all three cases, clarification of constitutional standards in *Rhodes* v. *Chapman* and *Bell* v. *Wolfish* justified modification of consent decrees to permit double-bunking); *Theriault* v. *Smith*, 523 F.2d 601, 602 (1st Cir. 1975) (Supreme Court decision construing underlying statute in a manner fundamentally different than parties' understanding at time consent decree entered justified vacation of consent decree).

Third, courts have balanced the interests of the parties, as well as that of the unrepresented public. *Heath* v. *DeCourcy*, 888 F.2d at 1110 (in determining whether modification furthers original purpose of decree, court must balance the interest of parties); *Plyler* v. *Evatt*, 846 F.2d at 214 (dangers in releasing prisoners early outweighed imposition on inmates of double-bunking); *Twelve John Does* v. *District of Columbia*, 861 F.2d 295, 299 (D.C. Cir. 1988) (courts must weigh the public interest in having lawful sentences carried out and in being protected from dangerous criminals); and *Duran* v. *Elrod*, 760 F.2d at 759 (court must consider public interest in approving, interpreting or modifying consent decree).

Fourth, the good faith of the defendant in attempting to comply with the decree has been held a relevant factor in considering whether to grant a modification, although the courts recognizing this as a factor have been inconsistent in determining what importance to place on it. *Plyler* v. *Evatt*, 846 F.2d at 215 (recognizing defendant's good faith in appropriating funds for and in beginning construction on new prisons before consent decree entered as a factor in affirming grant of modification); *Twelve John Does* v. *District of Columbia*, 861 F.2d at 300 (while expressing uncertainty whether a showing of "good faith" is by itself required, or whether it is merely a

factor to be considered in a balancing equation, modification was denied, *inter alia*, because of defendant's lack of good faith); *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 970 (defendant's good faith a factor in granting modification, even though court noted that defendant's hardship was self-imposed); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1121 (defendant's good faith recognized by court). *But see*, *Heath* v. *DeCourcy*, 888 F.2d 1105 (in which the court did not cite the defendant's good faith as playing any role in the decision to grant a modification). Conversely, in *Duran* v. *Elrod*, 760 F.2d at 762, the court described in detail the defendant's constant "foot-dragging" in complying with the consent decree, yet allowed the requested modification because of the overwhelming public interest that should not be penalized as a result of a defendant's intransigence.

Fifth, courts have considered whether the modification would be in derogation of the purpose of the decree. *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 969 (modification consistent with purpose of emptying mammoth state-run institution); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1120 (modification would keep in force most of the provisions of the decree, and would not subject the class members to the "original evils" the decree was intended to eliminate); *Plyler* v. *Evatt*, 846 F.2d at 212 (as modified, a consent decree's "central goal" of providing constitutional prison conditions would still be achieved). In determining the purpose of a consent decree, these courts have not focused upon the consent decree's language, but upon whether the plaintiffs' rights would still be protected under the decree as modified.

In the present case the District Court did not include, in formulating and applying its "flexible" standard, any of the factors the circuits courts have emphasized when considering requests to modify consent decrees.

From these recurring factors and the other considerations set forth above, this Court can fashion a new flexible standard which can be applied to the facts of this case, as well as to future requests to modify consent decrees in institutional reform litigation.

V. THIS COURT SHOULD ADOPT A FLEXIBLE STANDARD WHICH INCORPORATES PRINCIPLES OF FEDERALISM AND TAKES INTO ACCOUNT THE UNIQUE FEATURES OF INSTITUTIONAL REFORM LITIGATION.

Unlike the courts below, this Court should, in accord with the holdings and reasoning set forth above, adopt a flexible standard which, *inter alia*: recognizes and accommodates the particular features of institutional reform litigation; accords with and incorporates principles of federalism and equity, which define and limit the power of a federal court to impose remedies upon state and local governments; considers changes in the law which clarify and further define the rights the court sits to enforce; and includes the factors which have been held to justify modifications of consent decrees.

The result in the present case and the reasoning of the courts below illustrate the need for this Court to decide what standard should be applied to requests to modify consent decrees in institutional reform litigation. A decision by this Court is needed because: (1) while a majority of the circuit courts have agreed on the need for a flexible standard, have focused upon certain factors as favoring modification and have employed similar reasoning, they have not agreed upon the elements of a standard; (2) in the absence of a decision from this Court, the factors focused upon and reasons employed by different courts will continue to vary, increasing confusion among courts and litigants, and new standards, as articulated in this case,

will emerge; and (3) institutional reform litigation will be of continuing importance, and public official defendants will remain in need of a standard that, while protecting the rights of persons under federal law, allows the flexibility to modify decrees when the need arises.

The proposed standard meets these needs, fully protects the rights and interests of consent decree beneficiaries, incorporates basic principles of federalism and equity and is supported by the decided cases as well as practical considerations of the efficient judicial administration of consent decrees. The standard the Sheriff proposes consists of two criteria, each of which must be met, if the modification is to be allowed:

(1) Does the consent decree have a significant adverse effect on the public official defendant or on a particular public interest, which effect appears during the administration of the decree or arises from a change in circumstance?

(2) Would allowance of the requested modification avoid the significant adverse effect, without derogating from the purpose of the consent decree, as defined by the constitutional, statutory or regulatory provision that occasioned the original intervention, as that provision may have been further defined or clarified by subsequent judicial decisions?

A. The First Criterion.

In considering requests to modify consent decrees, the cases and commentaries have focused upon certain features of institutional reform litigation as justifying a flexible standard and as favoring modifications. *See supra* at 15-18. Also, this Court has emphasized that remedies imposed upon state or local governments should, to the extent possible, preserve autonomy and leave public officials free to exercise their professional judgment. *See supra* at 26-27.

The first criterion incorporates these concerns by focusing upon the consent decree's effect on the public official defendant and the public interest. Specifically, to properly weigh these concerns, a court should consider: (1) the difficulty of complying with the decree, despite good faith efforts to do so, *see supra* at 29-30; (2) whether the decree has placed the public official defendant under competing or conflicting obligations, such that he or she cannot both comply with the decree and discharge those obligations, *see supra* at 28; (3) whether there has been excessive interference with the exercise of the independent judgment of the public official defendant, *see supra* at 26-27; (4) the extent of the interference with the autonomous functioning of state or local government institutions, *id.*; (5) the extent of the interference with state or local statutory or regulatory schemes, *id.*; and (6) the extent to which there have been unanticipated adverse fiscal consequences from implementation of the decree. *See* Brief of Amici Curiae for the State of Tennessee, Etc., in Support of Petitioners (discussing unanticipated adverse fiscal consequences of consent decrees in institutional reform litigation).

This criterion would not allow a modification of a consent decree merely because, after the fact, a defendant thinks better of it. Instead, it requires a showing that the modification requested is justified by some objective condition and not simply a defendant's change of heart. The different elements of the criterion function together to insure that the modification requested is justified both by the importance of the interest affected and by a change in the conditions which formed the context for the entry of the decree.

B. The Second Criterion.

The second criterion requires that a court evaluate a proposed modification to a consent decree by reference to the constitutional, statutory or regulatory provision that occasioned the original intervention and not by reference to the purpose of the consent decree as found in the language of the consent

decree or the "intention" of the parties. This formulation of the criterion is required by both fundamental principles of federalism and equity and practical considerations in the administration of consent decrees.

First, a court sitting to resolve a disputed request to modify a consent decree should apply the same principles in determining whether to grant the request as it does when considering an application for injunction. The application of the same principles is required because the court exercises its judicial authority whether it decides what relief to enter on an application for injunction or substitutes its decision on a disputed request to modify a consent decree for what had been the choice of the parties. These principles of federalism and equity require tailoring the remedy to what is needed to vindicate the right at issue, preserving, to the extent possible, the autonomy of state and local government and giving deference to the professional judgment of state and local officials. *See supra* at 23-27, 30; *Board of Education of Oklahoma City* v. *Dowell*, ___ U.S. ___, 111 S.Ct. at 637; *Milliken* v. *Bradley*, 433 U.S. at 280-81. A court can apply these principles only by looking to the underlying federal law to determine whether a proposed remedy is both sufficient to vindicate a given right and is tailored so as to meet these limitations on the court's authority.

If the purpose of the consent decree were found instead in the consent decree's language or in what the parties intended, remedies would be judged as sufficient not by the requirements of the law the court is sitting to enforce, but by reference to "rights" created by the parties. This would transform the court into what it is not: a recorder and enforcer of private agreements and a judicial body whose authority flows not from the law, but from what the parties define as the purpose of the decree that brings them before the court. *Local Number 93* v. *City of Cleveland*, 478 U.S. at 537 (Rehnquist, J., dissenting) (citations omitted) (court's authority to adopt consent decree stems from underlying statute, not from parties' consent to decree).

In deciding whether the modification would derogate from the underlying constitutional or statutory purpose, a court should also consider changes or clarifications in that underlying law since entry of the consent decree. *System Federation No. 91* v. *Wright*, 364 U.S. at 651; *New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 971; *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975); See *supra* at 21-22. A court which does not consider changes in the law when deciding a disputed request to modify a consent decree will not be exercising its judicial authority to the fullest. The limitations on a federal court's power to impose remedies on a state or local government defendant can only be applied in the context of the law as it is when the court exercises its judicial authority.

Second, this criterion, by focusing upon the constant of the underlying law, rather than the varying language of consent decrees or differing judicial reconstructions of what was intended, will promote consistency between decisions of courts acting to vindicate the same federally-secured rights and between the decisions of different courts reviewing the same consent decree. *See New York State Association for Retarded Children, Inc.* v. *Carey*, 706 F.2d at 969 (district court's finding that purpose of consent decree was to place plaintiffs to fifteen-bed homes was dramatically different from circuit court's finding that decree's purpose was to empty a mammoth institution). Also, as a practical matter, a court cannot divine a purpose from consent decree language or from sources other than the law which occasioned intervention in any principled manner, especially considering the long and complex history typical of institutional reform consent decrees, and the fact that the public official defendants, counsel, and even judges change over the course of the litigation.

Third, if requests to modify consent decrees were evaluated by reference to the purpose of the consent decree, as defined by the consent decree's language, and denied if that purpose were not fulfilled, plaintiffs could avoid any change in a con-

sent decree by stating as its purpose the preservation without alteration of its various provisions, despite changes in circumstance. *See Ruiz* v. *Lynaugh*, 811 F.2d 856, 858, 862 (5th Cir. 1987). This would foreclose both as a practical matter, and contrary to the holding in *Swift*, the possibility of any substantive change in a consent decree requested by a defendant, remove the incentive for defendants to enter into decrees and allow the parties to restrict a court's equitable jurisdiction.

C. The Proposed Standard Preserves the Incentive to Enter Into Consent Decrees.

Consent decrees are frequently used devices to resolve complex and potentially costly litigation without a trial on the merits. Any standard proposed for evaluating a request to modify a consent decree should, to the extent compatible with other goals, preserve the usefulness of consent decrees as a means of dispute resolution.

The proposed standard does not remove this incentive. While federal rights require that some minimal constitutional threshold be met, they may be adequately vindicated by a wide range remedies. Under the proposed standard the parties to a consent decree are free to choose from this range of remedies. *See, supra* at 16. Also, any remedy agreed upon may only be changed by a particularized showing, and, as shown below, plaintiffs are guaranteed full access to the courts when a consent decree has an adverse effect on them. Finally, of course, the incentive to enter into a consent decree to avoid court-imposed remedies that may leave a party dissatisfied, and to avoid the time, expense and publicity of trial, remain. *See* Brief of Amicus Curiae State of New York (discussing continued incentive to enter into consent decrees after adoption of a flexible standard).

D. The Proposed Standard Balances the Goals of Flexibility and Stability in the Administration of Consent Decrees.

The proposed standard balances the goals of flexibility and stability. *See Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d at 1120 (an approach to modification that over-emphasizes finality at the expense of achievability would discourage settlement). Stability is provided because the decree may be modified only if a defendant shows both that the decree has an adverse effect and that the decree as modified will continue to vindicate the federally secured rights. In the absence of such a showing the decree is fully enforceable. Flexibility is provided because modification is allowed if the consent decree has an adverse effect on public institutions and/or public interests.

E. The Proposed Standard Appropriately Balances the Rights and Interests of the Parties.

Plaintiffs have always been able to seek modification of a consent decree when a remedy did not have the intended effect of vindicating a federally secured right. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968). Also, plaintiffs may seek modification where a change in the law results in an additional right accruing. *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961). The proposed standard redresses the imbalance between these rights of plaintiffs and the rights of defendants under the *Swift* standard or the stringent standard applied in the present case, by permitting a defendant to obtain a change in a consent decree which is harming the defendant or the public interest.

VI. UNDER THE PROPOSED STANDARD THE MODIFICATION REQUESTED BY THE SHERIFF SHOULD BE GRANTED.

A. The Consent Decree has Adversely Affected the Sheriff, Other Public Institutions and the Public Interest.

The Sheriff's requested modification meets the first criterion. As set forth in the Affidavits of the District Attorney for Suffolk County, Newman Flanagan, and Commissioner of Police of Boston, Francis Roache (J.A. 114-17, 122-28.), an unprecedented explosion in arrests in Suffolk County beginning in 1988 caused a significant increase in the jail population the Sheriff must house. In February, 1989, the number of male inmates committed to the Sheriff's custody reached 508. (F.C.R.A. 379.) Since the opening of the Nashua Street Jail the number of male inmates committed to the Sheriff's custody has remained in excess of the 419 cells available. This change of circumstance has affected the Sheriff's ability to meet his competing obligations and has also adversely affected the public interest.

The Consent Decree requires the Sheriff to hold one inmate per cell at the Nashua Street Jail. Mass. Gen. L. Ann. ch. 268, § 20 obligates the Sheriff to hold, upon pain of criminal sanction, all the inmates committed to his custody. Each inmate committed to the Sheriff's custody by one of the district courts of or the Superior Court of Suffolk County is accompanied by a mittimus. Thus, when the number of inmates committed to the Sheriff's custody exceeds the number of cells at the Nashua Street Jail, the Sheriff cannot comply with the Consent Decree and meet the obligations imposed upon him by statute and the orders of the courts of Suffolk County.

As a means of complying with the Consent Decree, the Sheriff, under orders entered in the State Litigation, adopted by the District Court, has transferred Suffolk County inmates

to the state correctional system and to other county jails with the cooperation of the sheriffs of those counties. (J.A. 138.) Massachusetts has a comprehensive scheme of jails, houses of correction and prisons. Jails for pretrial detainees and houses of correction for persons serving misdemeanor sentences are operated in thirteen of the state's fourteen counties. Massachusetts also operates a state-wide system of prisons. The Consent Decree has interfered with the autonomous functioning of this scheme by requiring the transfer of inmates out of Suffolk County, where they would be held, but for the Consent Decree's single-celling provision, to state prisons and other county jails. This is contrary to the state's scheme for housing its pretrial detainees in the county where they were charged, which is most often their county of residence. It places a burden on those facilities, removes Suffolk County inmates from family, friends and counsel, often increases their length of stay, places them in facilities that are inferior to those of the Nashua Street Jail and imposes a transportation cost of almost a million dollars a year. (J.A. 214.)

After the Sheriff has made all the transfers he can and the number of inmates in his custody still exceeds the number of cells at the Nashua Street Jail, the Sheriff must submit a list of inmates' names to a judge of the Superior Court, who must choose which inmates' bail to reduce to release on recognizance so that the inmates may be transferred to an unsecure "halfway house" or be released directly to the street. (F.C.R.A. 397-98.) Experience has shown that ten to fifteen percent of these persons walk away from the halfway houses. (J.A. 141.)

Massachusetts also has a comprehensive bail statute, Mass. Gen. L. Ann. ch. 276, § 58, which presumes that an inmate should be released on recognizance. This presumption is overcome only if a judge determines, pursuant to particular criteria set forth in the statute, that such release is inappropriate. This initial bail is reviewed, if the inmate chooses, at the next business day sitting of the Superior Court. The single-celling requirement of the Consent Decree interferes with the function-

ing of the Massachusetts bail statute. The Sheriff can comply with the Consent Decree only when inmates are released on their own recognizance, contrary to the criteria of the statute and the adjudication of at least one (the district) and often two (the Superior) courts. This is a direct interference with the public interest in and legitimate governmental objectives of insuring the appearance at trial of all those charged with a crime and insuring the public safety.

The Consent Decree places the Sheriff under competing and conflicting obligations, interferes with the intended functioning of the county and state correctional systems and the state's bail statute and harms the public's interest in having those for whom the setting of bail has been judged necessary remain in custody until bail has been met.

These adverse effects have occurred where there can be no doubt of the Sheriff's good faith efforts to comply with the Consent Decree. The Sheriff fully implemented all of the orders contained in the original judgment regarding changes in the administration of the Charles Street Jail. It was the Sheriff who brought suit in state court in October, 1984, to compel the construction of a new Suffolk County Jail, when it became apparent that the City defendants, who alone had the authority to appropriate funds, were not following the construction schedule contained in the Consent Decree. The Sheriff also brought motions in the State Litigation to permanently expand the Bail Appeal Project, to increase the number of cells at the Charles Street Jail by having the City refurbish sixteen old cells and to obtain temporary use at the Charles Street Jail of sixty modular cells owned by the Commonwealth.

B. The Limited Modification Requested Will Not Derogate From The Decree's Purpose Of Providing A Constitutional Jail.

The complaint in this case alleged that Suffolk County pretrial detainees were being held in conditions that violated the

Constitution. The purpose of the orders entered in this case and of the Consent Decree was to eliminate for Suffolk County pretrial detainees those unconstitutional conditions. The proposed modification to double-bunk 197 cells will not derogate from that purpose, because, even with these cells double-bunked, the jail will still provide constitutional conditions of confinement. None of the features of the new Nashua Street Jail will be altered under the Sheriff's double-bunking proposal. *See*, *supra* at 7-8.

In fact, the new Nashua Street Jail provides conditions that far exceed the constitutional minimum and, indeed, that exceed even the requirements of the Architectural Program. For example, the new jail has six outdoor recreation areas, while the Architectural Program requires only one. The new Nashua Street Jail also contains considerably more space than provided for in the Architectural Program. The Architectural Program required 309 cells and a total of 82,305 square feet or 266 square feet. The square footage, however, was increased to 151,840 square feet, a 54.2% increase, and the square feet per cell to 335 square feet. (F.C.R.A. 282, 365-72.)

After the Consent Decree was entered, this Court in *Bell* v. *Wolfish*, 441 U.S. at 535,[11] further defined a detainee's rights to constitutional conditions of confinement by clarifying that double-bunking is not *per se* unconstitutional:

> In evaluating the constitutionality of conditions or restrictions of pre-trial detention that implicate only the protection against deprivation of liberty without

[11] *Bell* v. *Wolfish* was decided one week after the Consent Decree was entered. In their Brief in Opposition to the Sheriff's Petition for Certiorari respondents suggest that the Sheriff's failure to raise *Bell* in a motion to modify earlier forecloses this motion to modify. Respondents' Brief in Opposition at 22. Under the proposed flexible standard, and the standards applied by a majority of the circuits, the Sheriff had no cause for moving to modify until 1989, when administration of the Decree began having a significant adverse effect.

> due process of law, we think that the proper inquiry is whether these conditions amount to punishment of the detainee.

The Court continued:

> Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more amount to "punishment".

441 U.S. at 539. The Court then held:

> On this record, we are convinced as a matter of law that "double-bunking" as practiced at the [Metropolitan Correctional Center in New York City] did not amount to punishment and did not therefore, violate respondent's right under the Due Process clause of the Fifth Amendment.

441 U.S. at 541.

Under this test, the modification the Sheriff requests would leave the inmates with a fully constitutional jail, and thus would not derogate from the purpose of the decree. The Sheriff made a clear showing that there was a legitimate public interest in double-bunking, since not doing so would require the Sheriff to put additional pressure on other state and county facilities, expend additional sums in transporting the detainees to distant counties, or prematurely release detainees who have already been denied release on two separate bail reviews. Double-bunking a portion of the new jail is a reasonable method of avoiding these adverse effects on the Sheriff, the inmates, other county and state facilities, the administration of the state's bail statute and the public interest in safety and in insuring the appearance at trial of all who are charged with a crime.

In considering the Sheriff's modification request, the District Court should have looked at the constitutional right the decree

was intended to vindicate — the provision of constitutional conditions of confinement. The District Court had no authority, when asked to assert its equitable jurisdiction, to hold that the Sheriff was required to continue to provide *more* than the Constitution requires. *See, supra* at 23-26.

In any event, the purpose of the Decree, as defined by the underlying constitutional provision, is identical to the purpose as stated in the Decree itself. The Consent Decree states as its only purpose that present and future members of the inmate class "will not be exposed to unconstitutional conditions of pretrial confinement." (Sheriff's Cert. Pet. 15a.) Consequently, the modification requested here should be granted whether this Court looks to the Consent Decree itself or looks to the underlying constitutional provision in defining the purpose of the Decree.

CONCLUSION

For all the reasons set forth above, the decisions below should be reversed and an order entered directing the allowance of the Sheriff's motion to modify the Consent Decree.

Respectfully submitted,

CHESTER A. JANIAK
Counsel of Record
THOMAS D. BURNS
PETER J. SCHNEIDER
ANN E. MERRYFIELD
WALTER M. FOSTER
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

ROBERT C. RUFO
200 Nashua Street
Boston, Massachusetts 02114
(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County